

1996

State of Utah v. Jay Lyle Jensen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	
Plaintiff/Appellee,)	
)	Case No. 960213-CA
v.)	
)	
JAY LYLE JENSEN,)	Priority No. 2
)	
Defendant/Appellant.)	ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT

Appeal from Judgment and Conviction to the Utah State Prison and Sentence for Attempted Sexual Abuse of a Child, a third degree felony, in violation of Utah Code Ann. § 76-5-404.1, in the Second Judicial District in and for Davis County, the Honorable Glen R. Dawson presiding.

**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 960213-CA

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Attorneys for Appellee

FILED

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COURT OF APPEALS

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DETERMINATIVE AUTHORITY

See cases, etc., cited above. *in passim*

ARGUMENT

1. BECAUSE THE RECORD ON APPEAL IS INADEQUATE IN TERMS OF WHEN THE DISPUTED LETTERS WERE RECEIVED BY THE TRIAL COURT, THE INSTANT CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR A CLEAR DETERMINATION, *INTER ALIA*, AS TO WHEN THE LETTERS WERE RECEIVED.

In its Brief, the State argues that the sentencing hearing was held prior to the arrival of the letters, and that the trial court sentenced Defendant without ever having seen the letters (Brief of Appellee, p. 6). The State further claims that the two letters were sent by fax to the trial court, and that the transmittal time at the top of the letters indicates that they were not received until an hour after the sentencing hearing (*Id.*).

Notwithstanding the State's contentions, a closer review of the record, including the copies of the letters themselves (see Letter from J.D.P., dated February 23, 1996, and Letter from C.S., dated Jan/Feb 1996, a true and correct copy of which is attached hereto as Addenda A in the Addendum; see also R. 91-96), indicates that the record is anything but adequate in terms of showing when the letters were actually received by the trial court. First, the date of the letters, *i.e.*, the "February 23, 1996", date on the upper left side of the first page of the letter from J.D.P. and the "Jan/Feb 1996" date on the upper right side of the first page of the letter from C.S., indicate that the letters could and might have been received well in advance of sentencing that took place on February 26, 1996, at apparently 9:15 a.m. Second, the letters contained in the record are anything but clear as to the actual time when the letters were

received. The information at the top of the J.D.P. letter states, "02-26-1996 10:39AM . . . P.02" and appears to be a facsimile transmittal information notation. However, there is nothing in the record about what happened to page one, which might be a facsimile cover sheet containing information about the date and time and from whom the letters were sent. Interestingly, the apparent transmittal information does not contain any notation as to the facsimile telephone number of the transmitting party, which in counsel's experience, is a usual and customary notation at the top of documents received by facsimile. Further, there exist unanswered questions arising from record as to the nature in which the letters were received and the timing of the same. Namely, whether the original letters were mailed to the trial court and, if so, whether and when the original letters were received.

Notwithstanding the State's comments in its Brief, the record, as evidenced above, is inadequate to support a clear determination by this Court that the letters, which contain several inaccurate unsubstantiated assertions about Defendant (see Appellant's Brief, pp. 19-21), were received by the trial court prior to sentencing. *In re Estate of Murdock*, 884 P.2d 749, 755 (Kan. App. 1994) ("Assertions or arguments of counsel before the trial court, the appellate court, or in an appellate brief are not evidence and do not remedy inadequacy in the record on appeal") (quoting *Kenyon v. Kansas Power & Light Co.*, 836 P.2d 1193 (1992)); *Westrac, Inc. v. Walker Field*, 812 P.2d 714, 718 (Colo. App. 1991) ("bare statements made in the

briefs of litigants cannot supply that which must appear from a certified record"). In fact, the manner in which the letters appear in the record call into question the date, time, and manner in which the letters were received.

If indeed the letters were received prior to sentencing without disclosure to Defendant, then the trial court violated Defendant's fundamental rights to due process by precluding Defendant of notice and the opportunity to rebut and present evidence in his own behalf as to the allegations made in the letters. *State v. Gomez*, 887 P.2d 853, 855 (Utah 1994); *State v. Lipsky*, 608 P.2d 1241, 1247-48 (Utah 1980); *State v. Hanson*, 627 P.2d 53, 55 (Utah 1981); *State v. Anderson*, 632 P.2d 877, 878 (Utah 1981); see also Utah Code Ann. § 77-18-1(7). By so doing, the trial court failed to insure that the decision-making process and the ultimate sentence was predicated upon accurate and reasonably reliable and relevant information. See *State v. Johnson*, 856 P.2d 1064, 1071 (Utah 1993); *State v. Howell*, 707 P.2d 115, 118 (Utah 1985).

At the very least, the instant case should be remanded to the trial court for a clear determination, *inter alia*, as to when the letters were received. Such a determination is necessary to protect Defendant's constitutional rights to due process and the effective assistance of counsel.

Finally, after further review of the record and arguments by the State in its brief in response to Argument II in Defendant's Brief, Defendant concedes no error as to comments made by his former spouse

at the hearing prior to sentencing. This however, in no way, affects Defendant's argument concerning the undisclosed letters as discussed above and set forth on pages 12-26 of Appellant's Brief.

CONCLUSION

Based on the foregoing, Defendant respectfully asks that this Court vacate his sentence and remand the case for resentencing in light of the contents set forth in the undisclosed letters submitted to the trial court. In the event that this Court concludes that the record on appeal is inadequate for such a determination, Defendant respectfully requests that this Court at least temporarily remand the case for findings as to the manner and time when the letters were received for a review Defendant's claims on appeal concerning due process and the effective assistance of counsel.

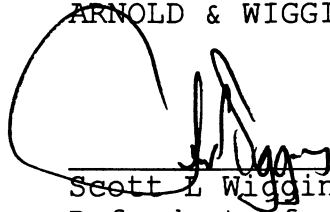
STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant requests oral argument because oral argument will materially enhance the decisional process due to the significant issues in the instant appeal dealing with the constitutional right to due process and effective assistance of counsel, which are matters of continuing public interest and which involve issues requiring further development in the area of criminal law case development. Counsel for Defendant further requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official Publication" for purposes of precedential value in future cases in

light of the limited number of cases addressing the adequacy or inadequacy of a record for purposes of review.

RESPECTFULLY SUBMITTED this 24th day of February, 1997.

ARNOLD & WIGGINS, L.C.

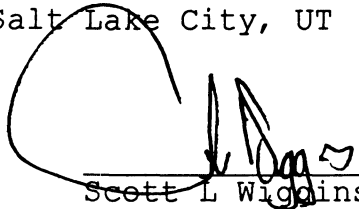
A handwritten signature in black ink, appearing to read "Scott L. Wiggins", is written over a horizontal line. The signature is stylized with a large loop on the left and a series of vertical strokes on the right.

Scott L. Wiggins
Defendants for Defendant

CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed two (2) true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid, to the following, on this 24th day of February, 1997.

JOANNE C. SLOTNIK
ASSISTANT ATTORNEY GENERAL
JAN GRAHAM
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Scott L Wiggins

ADDENDUM

Addenda A: Copy of Letter from J.D.P. dated February 23, 1996 and copy of Letter from C.S. dated Jan/Feb 1996

Addendum A

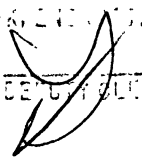
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February 23, 1996

CLERK OF DISTRICT COURT

BY  CECL F. CLARK

The Honorable Judge Dawson:

I am unable to attend these proceedings as I have been subpoenaed in another court at this hour. I have given this letter to my mother, Cheryl Strauss, to be read and entered into the record regarding my feelings about Jay Lyle Jensen.

I strongly urge, and beg of you to sentence Lyle to LIFE IN PRISON to save other victims from his abuse. You and I know there is no reforming a person with a history like Lyle's this late in his life. I would like to save others from the horror he has inflicted to myself and other victims of his abuse.

I have been told Lyle will not be allowed to have my address or phone number. I do not want him around my children, my husband, or myself as I fear for our safety.

I am convinced after having lived with Lyle and being around him, he has no regard for the law. He feels, and has bragged, that laws are made to broken, and no matter what he does, he is not accountable for his actions.

As you know from the pre-sentencing report and evaluation done at the prison over these past weeks, I

have been an actual sexual, emotional, physical and psychological victim of Lyle's depravity, and had to endure an entire lifetime of suffering due to his exploitation. I have suffered from low self esteem and feeling I could accomplish nothing worthwhile. I have been in therapy for most of my life and it took me 34 years to realize I was smart enough to go back to school and improve my life. (I am happy to report I have earned 2 degrees, with honors.)

I have read statistics regarding people who rape and molest children at an early age and continue to do so throughout their life, and are finally sentence this late in life, that no amount of counseling can reform a life long habit of rape and molestation of children. I shall not bore you with recidivism statistics, I believe Lyle's record speaks for it's self to that issue.

Lyle's response to any charges has always been that my mother, Cheryl Strauss, or Stepmother , Mary Ann Jensen, (both whom have suffered abuse at his hand that I have witnessed) caused his deviant behavior. He believes that nothing is his fault and everyone else is to blame for his attitude and actions. NEVER has Lyle admitted to either me, my sisters, my brothers or anyone else he has abused what he has done. He does not believe

his actions are wrong.

To reiterate, I respectfully request and beg of you to sentence Lyle to LIFE IN PRISON, WITH NO CHANCE OF EVER BEING PAROLED.

Thank you for this opportunity of letting me be heard.

Jyle D. Pettersson

(Daughter of Jay Lyle Jensen)

Jan/Feb 1996

To Whom It May Concern:

Because my association and marriage to Jay Lyle Jensen was a horrible and painful experience and I have since put those years and memories behind me, and I now enjoy a wonderful, productive and peaceful life and subsequent fulfilling marriage, I regret the necessity of dredging up the past.

This is not done in the spirit of vindictiveness, bitterness, nor hate. I have long since forgiven Mr. Jensen the wrongs inflicted on my children and my self and feel only compassion and pity for the sick person he is. It is my hope what is said here will be used constructively for the healing of Mr. Jensen and to prevent further victimization of others.

Mr. Jensen is now in his seventh or eighth marriage. During our eight years of marriage,,Mr. Jensen had several affairs with other women(at least 7 that I am aware of) that resulted in many children born out of wedlock.

Further, Mr. Jensen sexually molested our children, leading them to believe this was perfectly normal behavior because Daddy "loved" them and this is what Daddies do.

"Don't tell Mommy, she doesn't know what she's talking about", and "Mommy doesn't love you like I do".

Mr. Jensen is called "Lyle" by our children. None of them consider him their "Dad" other than he biologically begat them.

Our thirty-six year old daughter has been devastated by his abuse and is still reeling from the affects of Mr. Jensen's attitude and actions. She is still in therapy. Her children are also victims of Mr. Jensen's actions and attitude because of the difficulty their Mother has in dealing with her past.

At the time of our divorce, I was given custody of our children, with Mr. Jensen having very limited visiting privileges . Mr. Jensen, upon release from one of his many stints in prison, went to the children's schools and took them---for a year I had no idea where they were,,only that they were taken on the pretext of a family emergency. During that year, the children were told I knew where they were but I didn't want them. All of our children struggle to have healthy relationships because of the emotional trauma caused by Mr. Jensen.

In 1967, Mr. Jensen absconded from parole in Washington state taking us to Hawaii with funds obtained from bad checks. I was not allowed to handle any money, nor have my name on his accounts. Even so, he tried to convince the authorities that these were written by me, not him...I was the cause of all his grief.

It was in Hawaii I first discovered Mr. Jensen's behavior with our oldest daughter,,only to be told it was my imagination. Doctor exams proved otherwise. It was then I was informed by the authorities Mr. Jensen had molested his younger sisters.

In 1978, in Pocatello, ID., Mr. Jensen was accused of molesting a neighbor girl. He accused one of his sons of the act and tried to get his son sent to jail instead of himself.

in 1977-78, Mr. Jensen lived in Pocatello, ID., I was 70 miles away in Rupert, ID. The boys were told on numerous occasions to go to Rupert and "raise all the hell you can, when you get picked up, call me and I'll come bail you out. I want to ruin your Mothers reputation." (They managed to do just that, but truth prevailed, and those that mattered saw Mr. Jensen for what he is.)

Our boys were coerced into stealing parts (and other things) for Mr. Jensen's business, (Auto repair) because they were minors they wouldn't have as serious

repercussions if caught as Mr. Jensen would face being a several time convicted felon. I am proud to say the boy's have since become honest, productive citizens in spite of Mr. Jensen's influence.

Mr. Jensen has paid a total 120 and some dollars for child support according to court records. He has never supported any of his children legitimate or not, even when they lived with him the things he provided were obtained illegally; i: stolen goods or bad checks. Mr. Jensen's assets were hidden in other people's names to prevent creditors or court orders from getting what was what was owed.

When our oldest boy was 13 years old, Mr. Jensen gave him a car, motorcycle and snowmobile and allowed him to operate them even though he was not old enough to do so legally. Each of the fore mentioned vehicles were stolen.

Mr. Jensen moved us from pillar to post, moving into a neighborhood, ingratiating himself with neighbors and Church authorities, running up unpaid bills, floating bad checks, then moving on to the next community to start all over again.

Even though our children and myself have endured abusive treatment by Mr. Jensen, I bear him no ill. However, some how the lives of others and society it's self must be protected from Mr. Jensen. The few things related here are microscopic compared to all we have been subjected to. It is my hope these few things may enlighten those proscribing appropriate action for Mr. Jensen.

It is my personal opinion Mr. Jensen needs to go where he can not inflict abuse of any kind on any one. Whether that be a incarceration in a penal system or in a hospital or some other secure facility. He is a sick, sick person who needs a great deal of help.

*CS Travis
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